

Sir Peter Gross
Chair
Independent Human Rights Act Review

from: Matthew Creagh
direct line:
email: [REDACTED]

03 March

Dear Sir Peter,

TUC response to call for evidence from the Independent Human Rights Act Review

We are writing in response to the Independent Human Rights Act Review panel's call for evidence, to state our support for maintaining the status quo and to highlight the importance of the existing functional relationship between the domestic courts and the European Court of Human Rights (ECtHR).

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Trade unions play a vital role in ensuring that fundamental individual and collective labour law rights are respected and upheld. Many of these rights are underpinned by the Human Rights Act and the European Convention on Human Rights. For example, we advocate the importance of strong collective bargaining rights, appropriate regulation, and enforcement to ensure the protection of employment rights, as well as equality of treatment for all, regardless of factors such as race, religion, age, gender, disability, sexuality and access to financial resources.

We believe the relationship between the domestic courts and the ECtHR functions well. The domestic courts are able to draw upon important legal principles in ECtHR jurisprudence, which can bolster legal protections for UK workers. Whilst this Review rules out reforming the substantive rights set out in the Convention, we are concerned that by considering whether important ECtHR jurisprudence should be disregarded by the domestic courts, the HRA could nevertheless be undermined.

We consider the Convention to be a living instrument. The Convention evolves especially by means of the interpretation of its provisions by the European Court of Human Rights. Through its case law the Court has made the Convention a living instrument; it has thus extended the rights afforded and has applied them to situations that were not foreseeable when the Convention was first adopted.¹ We believe that the

¹ Public Relations Unit (2014). "The ECHR in 50 questions", European Court of Human Rights.

reforms under consideration in the Review would fundamentally alter the nature of the Convention. It could cease to be a living instrument and working people could miss out on important workplace protections established by the European Court of Human Rights.

We will not be submitting a detailed response to the questions of the Review. Instead, we've set out some key points in response to the themes in the review's terms of reference.

Reform is unnecessary and could make things worse

Echoing calls from experienced members of the judiciary, we believe the status quo should be maintained. At a recent evidence session at the Joint Committee on Human Rights, Baroness Hale, former President of the Supreme Court, highlighted that any reform could lead to a worse situation.

"I don't think the Human Rights Act causes a problem for Parliament because it is very carefully crafted to ensure that Parliament remains supreme and can take whatever it deems fit, including doing nothing at all, even if the courts have said that a particular piece of legislation is incompatible with the convention rights."

"So I don't think there's a problem and I don't think there's any need to fix it."

"And I cannot myself think of a fix that would make things better as opposed to potentially making things worse."

The existing relationship/framework enables the domestic courts to have regard to important human rights principles that interact with the employment relationship

We believe that the existing HRA legal framework and established relationship between domestic courts and ECtHR, allows the domestic courts access to a rich vein of ECtHR jurisprudence that can be considered and used to bolster the human rights and workplace protections of UK workers. We do not believe that any actions should be taken that would restrict the courts' ability to draw on this jurisprudence. Important workplace rights are derived from ECtHR jurisprudence². These safeguards ensure that workers and trade unions are able to exercise their fundamental rights. Below we refer to some examples of significant principles established by the ECtHR, including some cases involving UK workers.

- ***Trade union rights***

Ground-breaking principles relating to Article 11, Freedom of Association have been established in the ECtHR, notably in *Demir & Baykara*³. This judgment established that the right to collective bargaining is 'an essential element' of the right to freedom of association and embedded the jurisprudence of the International Labour Organisation and the European Social Charter into that right⁴. It's vital that as the UK is a signatory to the ECtHR, UK workers can benefit from the legal principles that are established to

² Press Unit (2021). "Work Related Rights". European Court of Human Rights.

³ CASE OF DEMIR & BAYKARA (2008).

⁴ K D Ewing and John Hendy QC (2010). "The Dramatic Implications of Demir and Baykara", *Industrial Law Journal*

support the Convention rights. By reforming section 2 of the Human Rights Act, workers could be prevented from benefitting from important principles established by experienced tri-partite bodies such as the ILO.

- ***Right to privacy – particularly relevant in the pandemic, with more people working from home***

The ECtHR has established that important workplace safeguards must be in place to ensure that Article 8 (right to respect for private life and correspondence) of the Convention, is respected and upheld.

The case of *Barbulescu*⁵ set out detailed steps for employers to take before adopting surveillance methods in the workplace. These safeguards are particularly relevant in the context of increased working from home during the pandemic and the likely shift to hybrid working post pandemic.

In the case of *Copland*⁶ the Court held that there had been a violation of Article 8. It considered that the collection and storage of personal information relating to the applicant through her use of the telephone, e-mail and internet had interfered with her right to respect for her private life and correspondence, and that that interference was not “in accordance with the law”, there having been no domestic law at the relevant time to regulate monitoring. The ECtHR decision was important as it established important workplace privacy principles, plugging a gap in domestic law, as data protection legislation had not been implemented in the UK at that time.

- ***Right not to be discriminated against in the workplace***

The cases of *Perkins and Beck*⁷ concerned members of the UK armed forces, who had been discharged on the sole ground of their sexual orientation, in accordance with Ministry of Defence policy. They alleged in particular that the investigations into their sexuality and their discharge as a result of the absolute ban on homosexuals in the armed forces that existed at the time, had violated their rights under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention. In the four cases, the Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention. It found that the measures taken against the applicants had constituted especially grave interferences with their private lives and had not been justified by “convincing and weighty reasons”.

Proposed reforms could undermine the TCA

We believe that any reforms to the relationship between the domestic courts and the ECtHR could risk undermining the Trade and Cooperation agreement⁸ between the UK and the EU. This includes a commitment from the UK to continue to respect the rights set out in the ECHR:

Article LAW.GEN.3: Protection of human rights and fundamental freedoms

⁵ CASE OF *BĂRBULESCU* v. ROMANIA (2017).

⁶ CASE OF *COPLAND* v. THE UNITED KINGDOM (2007).

⁷ Ibid. footnote 2

⁸UK and EU Trade and Cooperation Agreement, page 283

1. The cooperation provided for in this Part is based on the Parties' and Member States' longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically

We believe that any reconfiguration of the relationship between the domestic courts and the ECtHR could lead to a weakening of human rights (including those that underpin vital workplace and trade union rights), jeopardising the EU/UK agreement, in particular, the provision relating to law enforcement and judicial cooperation⁹.

Yours sincerely

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Department

⁹ Leckey C, Taylor G (2020). "What does the Brexit trade deal mean for employment law?", *Lewis Silkin*